82 - 2123
No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

W. THOMAS PLACHTER, JR.
and PETER J. SERUBO,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX FOR PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1580

UNITED STATES OF AMERICA

v.

W. THOMAS PLACHTER, JR.,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-00203-02).

District Judge: Honorable Joseph S. Lord, III

Argued April 27, 1983

Before: SEITZ, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and BROTMAN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the applicability of Sections 3288 and 3289 is limited by the principles of statutory construction to cases involving specific errors or defects, (2) the applicability of Sections 3288 and 3289 is limited by their legislative and interpretive histories to cases involving technical errors and defects, (3) Sections 3288 and

*The Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

3289 do not permit reindictment where the first indictment is dismissed for any reason, and (4) reindictment of the defendants pursuant to Sections 3288 and 3289 should not be permitted under the circumstances of this case.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/_____
Chief Judge

ATTEST:

/s/_____
Sally Mrvos, Clerk

DATED: Apr. 28, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1641

UNITED STATES OF AMERICA

v.

PETER J. SERUBO,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-00203-01).

District Judge: Honorable Joseph S. Lord, III

Argued April 27, 1983

BEFORE: SEITZ, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and
BROTMAN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the court erred in ruling that the indictment was not barred by the Statute of Limitations, (2) the court should have granted the defendant's motion to suppress the seizure of his personal checks, (3)

* The Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

the evidence failed to show that the defendant willfully attempted to evade payment of a tax, (4) the trial court improperly admitted evidence concerning matters for which Mr. Serubo was not on trial, and (5) the court improperly refused to act upon the government's prosecutorial misconduct, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/
Chief Judge

ATTEST:

/s/
Sally Mrvos, Clerk

DATED: April 28, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
-v-	:	CRIMINAL NO. 80-203
PETER J. SERUBO, W. THOMAS PLACHTER, JR. and DONALD H. BROWN	:	

M E M O R A N D U M

Joseph S. Lord, III, Ch. J. November 12, 1980

Defendants were indicted on March 13, 1978, Crim. No. 78-71, on numerous counts of tax fraud, and one count of conspiracy to commit tax fraud, in violation of 26 U.S.C. §§ 7201, 7206(2) and 18 U.S.C. § 371. On April 29, 1980, Judge Newcomer dismissed this indictment without prejudice. *United States v. Serubo,* Crim. No. 78-71 (E.D.Pa. April 29, 1980). *See United States v. Serubo,* Crim. No. 80-203, slip op. at 2 n.2 (E.D.Pa. Nov. 12, 1980) (Lord, C.J.) (*Zudick* plea bargain discussion). On July 2, 1980, a grand jury returned a second indictment, Crim. No. 80-203, charging almost identical violations of the Internal Revenue Code. Defendants move to dismiss this indictment, contending that it is time barred. For the reasons which follow, I will deny this motion.

The applicable statute of limitations is six years. 26 U.S.C. § 6531. However, under 18 U.S.C. § 3288, if an indictment is dismissed after the applicable statute of limitations has run, the Government has six months from the date of dismissal to reindict.[1] Defendants do

1. 18 U.S.C. § 3289 applies where the dismissal occurs before the applicable statute of limitations runs, but where the statute will run within six months of the dismissal period. It gives the Government six months from the date the statute would have expired to reindict. Here, § 3289 applies to the conspiracy count. The operative language in both sections is identical; accordingly my analysis of § 3288 applies to § 3289.

not dispute that the present indictment was brought within six months of dismissal. However, they argue that the saving clause applies only to indictments which were dismissed because of technical irregularities. When, however, the indictment is dismissed because of intentional prosecutorial misconduct, defendants argue that 18 U.S.C. § 3288 is not available to "assist" the Government.

Section 3288 states in pertinent part:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, *or an indictment* or information filed after the defendant waives in open court prosecution by indictment *is found otherwise defective or insufficient for any cause*, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information . . . .

18 U.S.C. § 3288 (emphasis added). The language is clear: if an indictment is dismissed *for any reason*, § 3288 can "save" a timely reindictment. The legislative history likewise supports this commonsensical reading. "The sections [§§ 3288 & 3289] concern cases where a new indictment is returned after a prior indictment has been dismissed, because of an error, defect, or irregularity with respect to the grand jury, *or because it has been found otherwise defective.*" [1964] U.S. Code Cong. & Ad. News 3257, 3258 (emphasis added).

In *United States v. Charnay*, 537 F.2d 341 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976) defendants similarly argued that § 3288 applies only if an indictment is dismissed because of technical defects or irregularity in the grand jury. After a thorough analysis of the statutory language and the appropriate legislative history, the Ninth Circuit stated: "While the first clause of § 3288 appears to be aimed at dismissal resulting from

irregularities in the grand jury, the second clause is much more general." *Id.* at 355. The court therefore held that the Government could reindict "where the dismissal of the first indictment is due to a legal defect." *Id. See also United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976) ("§ 3288 was meant to apply whenever the first charging paper was vacated for any reason whatever . . . . ")

Defendants cite many cases to support their argument. However, none is dispositive. *United States v. Grady*, 544 F.2d 598, 601 n.3 (2d Cir. 1976) does state that § 3288 "is available only if the dismissal is for technical defects or irregularity in the grand jury." Yet the issue in that case involved the effect of a *superseding* indictment on an indictment which had been returned within the appropriate statute of limitations. The statute of limitations had already been tolled; there was thus no reason to rely on § 3288 in order to "save" reindictment. The *Grady* discussion of § 3288 is therefore dictum. Surely such dictum cannot be read as to overrule *sub silentio* the *Macklin* holding — another Second Circuit case.[2]

Defendants also cite *United States v. Moriarty*, 327 F.Supp. 1045 (E.D.Wis. 1971). *See also Grady*, 544 F.2d at 601 n.3 (citing and relying upon *Moriarty*). *Moriarty* did hold that "[s]ection 3288 is specific in its requirement that an otherwise time-barred count can be allowed only if the earlier dismissal related to irregularities occurring in connection with grand jury proceedings." 327 F. Supp. at 1047-48. However, the opinion did not fully quote § 3288, for it stated that "[p]rior to 1964, 18

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2. Defendants also rely on *United States v. DiStefano*, 347 F. Supp. 442 (S.D.N.Y. 1972). *DiStefano* narrowly held that "where the indictment has been dismissed for failure to prosecute, reindictment is not possible once the statute of limitations expires." *Id.* at 444. However, the case predates *Macklin* and therefore has very slight precedential value.

U.S.C. § 3288 provided for reindictment, notwithstanding the running of the period of limitations, 'whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, *or is found otherwise defective or insufficient for any cause* . . . .' However, as presently worded, § 3288 allows reindictment, with one exception, only after dismissal of an indictment for 'error, defect, or irregularity with respect to the grand jury.' " *Id.* at 1047 (emphasis in original). As I noted, p. 2 *supra*, present § 3288 expressly provides for reindictment after dismissal "for any cause." *Moriarty* is therefore flawed because it ignored the pertinent words of the statute and thus did not adequately treat the statutory language. Hence I decline to follow it.[3]

I conclude that the plain language of §§ 3288 & 3289 applies. Consequently I hold that dismissal of an indictment because of prosecutorial misconduct does not bar timely reindictment pursuant to §§ 3288 & 3289. I will therefore deny defendant's motions to dismiss.

/S/ _____
Joseph S. Lord, III
Chief Judge

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3. In any event, the *Moriarty* holding was discussed and rejectd in the more recent Ninth Circuit *Charnay* opinion.

UNITED STATES OF AMERICA

v.

W. THOMAS PLACHTER, JR.

and

PETER J. SERUBO

APPEAL NOS. 82-1580 & 82-1641

Oral Argument

April 27, 1983

BEFORE:

JUDGE SEITZ, Chief Judge
JUDGE HIGGINBOTHAM, Circuit Judge
JUDGE BROTMAN, District Judge

APPEARANCES:

Counsel for Appellants	*Counsel for Appellee*
THOMAS A. MASTERSON (W. Thomas Plachter, Jr., Appellant in No. 82-1580)	WILLIAM C. BRYSON
F. EMMETT FITZPATRICK (Peter J. Serubo, Appellant in No. 82-1641)	

JUDGE HIGGINBOTHAM: Are we ready to proceed?

MR. MASTERSON: Yes, sir.

JUDGE HIGGINBOTHAM: Proceed.

MR. MASTERSON: If the Court please, my name is Thomas A. Masterson and I represent the appellant, Thomas Plachter. Pursuant to the Court's order, the ap-

pellants have been allowed 15 minutes. We propose to divide the argument, 10 minutes to myself, 5 minutes to my colleague, Mr. Fitzpatrick. I would like to start with 8 minutes opening and reserve 2 minutes for rebuttal.

JUDGE HIGGINBOTHAM: Granted.

MR. MASTERSON: Thank you, sir. In view of the limited time for argument in this case, I will spare the Court a recitation of the torturous history of this prosecution. It's set out in all of the previous opinions both by Judge Newcomber, this Court and Judge Lord.

The precise issue before this Court this morning is whether or not the saving statute, the provision of the savings statute, 18 USC 3288 and 3289, permit the reindictment of a defendant after the Statute of Limitations has run on the offenses for which he is indicted, when a first indictment was dismissed because of acts of prosecutorial misconduct which have been judiciously characterized by this Court as extremely unsavory, reprehensible and blatant. It is the defendant's position that neither the language of §3288 and 3289 nor the cases heretofore interpreting that language permit this result.

JUDGE HIGGINBOTHAM: Actually, would you concede that we have never — that there is no other case which has this precise factual situation in terms of the dismissal?

MR. MASTERSON: The reason for the earlier dismissal.

JUDGE HIGGINBOTHAM: Yes.

MR. MASTERSON: That is one of my major points of argument, sir. There is no such case and I submit to this Court there ought not ever to be such a case. And I think that that conclusion stems from an analysis of the language of the savings statute and the cases which were interpreted. I would like to take a moment, if I may, to parse the language of the statute with the Court and you can divide the operative language in either the two or three clauses. I prefer to divide it into three clauses

because I think the cases which have been decided under the act logically fall into three different categories.

The first phrase — operative phrase — is "Whenever an indictment is dismissed for any error, defect or irregularity with respect to the Grand Jury." Now there are a number of cases that have interpreted that part of the act. All of those cases are cases where the first indictment was dismissed by reason of some technical violation of Federal Criminal Rule No. 6 relating to the organization and functioning of the Grand Jury. For example, in *United States* vs. *Macklin*, the first indictment was dismissed because it had been returned by the Grand Jury beyond the term of that Grand Jury. Then the other cases that are cited by both sides underneath that part of the statute which are *U.S.* vs. *Ponder*, *U.S.* vs. *Hill*, *U.S.* vs. *Zirpolo*, and *U.S.* vs. *Hoffa*, every one of those cases is a case in which the first indictment was dismissed because of the fact that the Grand Jury had been improperly impaneled either because blacks had been excluded or women had been excluded or whatever. But the gravemen of the quote "irregularity or defect with respect to the Grand Jury" was just that. It was a defect in the organization of the Grand Jury or a defect in the functioning of the Grand Jury.

Now, the next phrase in the statute is — or when an indictment is "found otherwise defective." All of the cases that logically fit under that phrase are cases in which the original indictment was dismissed by reason of a technical defect, principally a violation of Federal Criminal Rule No. 7, and in that connection I cite to the Court *U.S.* vs. *Porth*, *U.S.* vs. *Civic Plaza National Bank*, and *U.S.* vs. *Bair*. *Civic Plaza National Bank* is particularly interesting because the first indictment was dismissed because of a violation of Federal Criminal Rule No. 7 and then the government within six months — and that was a technical defect — and the government within six months proceeded by information and the

court there said the statute does not say you can recharge by information. It says you have to recharge by indictment. And since this is a criminal statute, we strictly construe it and information is not an indictment. The statute does not provide for it.

Now the final clause of the relevant language is an indictment which is found "insufficient for any cause." I submit to this Court that all of the cases which logically fall under that section of the statute are cases in which the indictment itself is defective in that — most of them, incidentally, are cases in which the indictment is defective because it fails to allege an offense. That is *U.S.* vs. *Charnay*, the Ninth Circuit case, the *Kearney* cases and *U.S.* vs. *Main*. In all of those cases where they said that the original indictment was "insufficient" it was insufficient because it failed technically to charge an offense and, therefore, fell below the standard required by Federal Criminal Rule No. 7. So —

JUDGE HIGGINBOTHAM: You have distinquished all of the cases admirably, but what is the policy reason as to why Mr. Plachter should be treated differently than the other cases?

MR. MASTERSON: Well, I think there is an obvious difference between a ministerial technical and an unintentional defect or error, and a previous indictment which was dismissed because this Court found that the federal prosecutor had blatantly, deliberately, wilfully violated the Fifth Amendment right of the defendant to an unbiased Grand Jury. I think there are obvious reasons to permit reindictment when the first error is not a result of a wilfull, deliberate and malicious act of the government. I don't think they are entitled to any grace.

JUDGE HIGGINBOTHAM: Let me give you this hypothetical.

MR. MASTERSON: Yes, sir.

JUDGE HIGGINBOTHAM: If what you're concerned about is the perniciousness of the government's conduct, then it seems to me that if you want to punish

or to react because of the perniciousness of the government conduct, then a prosecution should be precluded with or without this extension problem. If you want to have some type of symmetry, if what you're concerned about is the perniciousness of the process, then you should just preclude prosecution.

MR. MASTERSON: Well, I agree with that, Judge Higginbotham, and we argued that to this Court in an earlier appeal and this Court did not agree with that position. Therefore, the question arose as to whether under these circumstances the saving act should apply. Our initial position was we shouldn't even get to that because the indictment should be barred forever. But if you read the first and second, the first opinion of this Court and the judgment order in our second appeal, I think the conclusion is clear that the Court felt that the prosecutorial misconduct tainted the first indictment and, therefore, that should be dismissed. But then if the government had the right to go forward to indict an unbiased Grand Jury, it was not going to prevent that. So it didn't.

Our position before this Court today is the Government does not have the right to go forward because it does not come within the language or the decided cases under the savings act.

JUDGE SEITZ: Your argument reduces out the proposition Congress didn't intend to contemplate this situation.

MR. MASTERSON: Exactly. That is it in a nutshell. thank you, Chief Judge Seitz.

MR. FITZPATRICK: Good morning. My name is Emmett Fitzpatrick and I represent Mr. Serubo, and I had anticipated, because of the importance of the point raised by Mr. Masterson, really not arguing on the Statute of Limitations problem and will not do so. As a matter of fact, I frankly thought my time would be used up by Mr. Masterson and that would have been perfectly fine with me. I think the point is so important.

I want to apologize for an apparent oversight or misunderstanding of the Court's rules on my behalf. When the appendix was prepared, it was my understanding that the entire trial record would be available to the Court. From reading the brief of my opponent, he points out that that was not done because I did not order the transcript. I had assumed that that would have been available.

I would like to mention two other points that occurred that directly affected my client that I have raised in my brief. One is the item of his personal checks. In spite of the past history of this case which I was not part of until just recently, before the last trial before Judge Lord, no one ever discovered that the personal checks of my client for the years in question, '71 through '73, were voluntarily turned over by his accountant to the government. And they were done so according to the government's testimony through the consent of my client. My client never knew that. A hearing was held and he testified I had no recollection, no knowledge that these checks were turned over. He was questioned about where these checks were kept and he said, "These checks were kept by me at my home. I gave them to my accountant for one specific purpose, so that he could figure out an analysis and return them to me. I did not know that they ever went to the government."

The accountant testified that, well, he didn't really talk to my client about it. He assumed he had been given permission by someone and that he thought it was a good idea. There is a protective statute in Pennsylvania and the government cites I think quite properly *Couch* vs. *The United States*, but I would like to take the opportunity to distinquish that because, as I read that opinion, that opinion turned upon the fact that in *Couch* the checks had regularly been stored or turned over to the accountant and were kept by the accountant as opposed by the party. And I would urge upon this Court that the Internal Revenue Service, which makes such a thing

over representation that it requires a specific signed Power of Attorney on their forms before they will chat with you about anything, in this instance, had an obligation — if indeed they realized not upon summons, but upon the consent of the taxpayer, they had an obligation to assure themselves they had that consent.

I would also like to mention one argument in the prosecutorial misconduct allegation raised in Argument 5 of my brief and that concerns a confrontation between a disclosed defense witness and the government prosecutor during the course of trial. One of the defenses in this case as to why Mr. Serubo charged off things like personal clothing was that in running his business he had an incentive program for his salesmen whereby he would say if you sell four cars this week, I will give you this sportcoat off of my back. Now that may seem like a rather childish way to run a business, but he testified and people testified that indeed it had been productive for him. He had done it for some time. We had requested certain salesmen come in to present this fact to the jury. One of these was a gentleman named Dolan. And Mr. Dolan was approached in the lobby of this courthouse after I told the trial attorney that Mr. Dolan would be a witness and he was asked, as the testimony of the trial attorney indicates, why he signed a particular check. Now the check had been introduced in evidence. They had an opportunity to turn it over for handwriting analysis. That had never been done. And at the trial the testimony of the endorsee about which Mr. Dolan was questioned was characterized as completely illegible. Nobody knew what it said.

Mr. Dolan, of course, denied that, became visibly upset, produced his driver's license right there for an examination, if indeed that was at all necessary. And it was only after an awful lot of cajoling that Mr. Dolan did come in. We had other witnesses who we had hoped to be able to produce, although people who sell auto-

mobiles are not easy to get into a courtroom. They never appear and they were never able under those circumstances to come in. Now I cannot say to this Court there is a direct relationship. I wish I could prove it, but how you can prove why a witness who doesn't come in didn't come in, I really don't know.

Nonetheless, I would respectfully point out to this Court that in the 25 years I at least have stood before the bar of the Court, sidebar on more than one occasion, and had the prosecution say an anonymous telephone call was received by our main witness last night and we would like you to revoke the defendant's bail because we think he had something to do with it. There was no legitimate reason for the government to have approached that witness and approach him about that. They admitted that they did not say to him, "What are you here to testify for?" They accused him of being a part of this case and that is in my opinion prosecutorial misconduct designed to do nothing more than to discourage witnesses in a case where I think witnesses were of vital importance to the defense. Thank you.

THE COURT: Thank you. We will hear from the government now.

MR. BRYSON: May it please the Court, my name is William Bryson from the Department of Justice and I represent the government in this case. I would like to address principally the Statute of Limitations question. The statute in our view clearly covers with respect to either of its two main clauses a dismissal for prosecutorial misconduct. The first clause by its language, it's clear enough, "covers dismissals for any ethical error, defect or irregularity with respect to the Grand Jury." By its plain language, what happened in this case, prosecutorial misconduct before the indicting Grand Jury, constitutes an irregularity before the Grand Jury and is, therefore, within that term of the statute. But even if it is not within that language of the statute, there is a second clause of the statute that is a catchall clause

which says "When the indictment is found otherwise defective or insufficient for any cause . . ." — for any cause — ". . . that the tolling statutes, the grace period statutes shall be applicable." Now the language in our view is enough to settle the matter right there. But in fact, the legislative history, the case law and the policy behind the statute all point in the same direction which is that the statute should be applicable to this kind of case. Now it's true —

THE COURT: Is there anything — I have the impression that there is nothing in the legislative history which focuses on the precise issue of dismissals for prosecutorial misconduct.

MR. BRYSON: That's correct, your Honor. What the legislative history says, and I think there is an explanation for that, because back in the thirties when this was passed, by and large Grand Jury proceedings were not recorded. There wasn't the kind of focus on the Grand Jury process with respect to the prosecutors' conduct before the Grand Jury that there has been in recent years, following in part from this Court's decision in the first *Serubo* case, and that was not one of the claims that was commonly made. It wasn't the kind of claim that was typically made to attack an indictment. Accordingly, the Congress — neither Congress nor the Attorney General in recommending the statute made any explicit reference to that kind of error. But what the Attorney General did and what the statute did back in 1934 when it was first passed was to say we want to cover all cases in which there is an indictment which is pending which is dismissed and the Statute of Limitations would have run, but we want to cover those cases and make sure that it doesn't run, that you can reindict. And the language that the Attorney General used in his transmittal letter which the Supreme Court later said was adopted in virtually word for word in the statute was language that was intended to cover all cases.

If I can read the language that was used in the letter, that the tolling statute should apply "in any case in which an indictment is found defective or insufficient for any cause in any case". And the purpose that the Attorney General set out and the purpose that was set out in the legislative history and that was reiterated by the cases that were decided shortly after the statute was passed all point in the same direction. That is, to quote from the *Strewl* case, the Second Circuit, shortly after the statute was enacted, "The purpose is to prevent the failure of a prosecution because an indictment found in season proves insufficient in law." And again, in the *Strewl* case, the tolling statute is to apply after the defendant succeeds on demurer or motion to dismiss after the error can be corrected, it will not discharge the accused. In this case there was a new indictment. The error was corrected. There is no claim that the new indictment was in any way tainted by any of the prior proceedings or was itself invalid. The error was corrected. The tolling statute should apply.

Now it's true there is no case that is directly on point here, although there are cases that are close and the language from the leading cases in this area covers this case quite easily. And the language —

THE COURT: You may have made this point, but is my impression correct that until "modern times" there was no — basically this type of attack probably never could have been made?

MR. BRYSON: Except in the rarest cases, your Honor, that's right, because by and large Grand Jury proceedings were not recorded until I think the late seventies. The requirement that they be recorded was put into the statute. It was really not until that time that the proceedings in the Grand Jury became subject to close scrutiny. There were some occasional cases, the *Esteppa* case, for example, in which Judge Friendly criticized the use of hearsay testimony and dismissed an indictment when the reliance on hearsay testimony was deemed un-

duly extensive. But, by and large, it's really only been within the last 10 years in which — within the last five years, really, which these kinds of claims have been made.

THE COURT: Since I came on this court I can remember we had no record — Grand Jury record from certain districts.

MR. BRYSON: That's right, your Honor. I think only in the last five or six years has that been. Certainly it's only been in that period that it's been mandatory.

But in any event, the language of both the cases and the statute certainly extend to this kind of error which is, if I can point to a couple of cases, the *Macklin* case from the Second Circuit is the leading case and the language there is very broad. The Court said the purpose of the statute is not to let the wrongdoer escape because the error is discovered too late, and the case then went on to say that the tolling statute applies whenever the indictment is dismissed for whatever reason, for any reason whatsoever. And that certainly includes a dismissal such as the one in this case.

Now what the appellants are asking this Court to do is to restrict the application of this statute to "technical errors". Of course, the statute doesn't contain any reference to technical errors. There is no definition of technical error and in fact, as I understand their argument, the appellants really aren't providing any clear guidelines as to what constitutes a technical error, and I submit that this Court —

THE COURT: I am satisfied this particular error is not a technical error.

MR. BRYSON: Well, I think this error is not a technical error, certainly not as the appellants would invite this Court to define technical error.

JUDGE HIGGINBOTHAM: Well, you would concede it's not a technical —

MR. BRYSON: No. your Honor, it's not a technical error.

JUDGE HIGGINBOTHAM: Is it the government's position that regardless as to how egregious and unconstitutional and inappropriate and wrong our conduct may be that the savings statute would give you always the right to reindict?

MR. BRYSON: Your Honor —

JUDGE HIGGINBOTHAM: No limits? No limits is your position?

MR. BRYSON: Assuming that the indictment should not have been dismissed with prejudice, your Honor, that's correct. Now there may be cases in which the indictment should be dismissed with prejudice because of government misconduct and particularly if there is some violation of the rights of the defendant that follow from that that can't be cured in any other way.

I think as a footnote to that, I think that the *Morrison* case in the Supreme Court said that those cases will be rare in which blatant government misconduct that does not result in any kind of injury to the defendant should result in the dismissal of an indictment with prejudice. But at least whereas this Court has held, as appellants concede, in its prior decision in this case, that the indictment should not have been dismissed and indeed was properly not dismissed with prejudice.

In those cases before any cause your Honor applies this statute across the board to any error, whether it's technical, whether it's substantive, whether it's egregious. The statute should not operate, in other words, as a means to come through the back door to introduce this prejudice/no prejudice dismissal argument that was made the last time the appellants were before this Court and unsuccessfully.

Now again, if you adopt a technical error definition, the application of the statute, you get into a mire I think of problems. The line between what constitutes technical errors and what constitutes substantial errors or

substantive errors would be almost impossible to draw and I invite the Court's attention to examples that immediately come to mind. What if the Grand Jury is in fact determined to have been biased? Suppose, for example, one of the grand jurors knows the victim of the crime. Is that a technical error if it's discovered later, or is it a substantial error? Is it a substantive error? What if the prosecutor was aware that the grand juror knew the victim and didn't do anything about it? Does that convert it from a technical error to a substantial error? What if in fact there is perjured testimony before the Grand Jury? There is a case in fact in which this was precisely the error that was involved and the Court held that that was — that is the *Goldman* case — held that that was not enough to take the dismissal out of the statute, of the tolling statute.

The other examples come up. What if there is hearsay testimony before the Grand Jury? All of these things tend to make the indictment invalid on the same grounds that the indictment was held invalid in the prior Serubo case, that is that the indictment was returned by a biased Grand Jury that was not in compliance with the requirements of the Fifth Amendment that you have a fair and unbiased Grand Jury. In this case, as in each of those cases, the error may have been non-technical, but drawing the line between the kind of technical error and the kind of substantial error that they are trying to point to here would, I submit, find no basis in the statute and be almost impossible to enforce on a case-by-case basis. As I say, the policy of the statute is that Congress wanted to make sure that defendants who ought to be prosecuted against whom there were valid indictments ultimately returned should not escape simply because they filed a motion to dismiss and the time statute of limitations ran prior to the time that the Courts were able to adjudicate the motion to dismiss and rule that the first indictment was invalid.

If the Court has no further questions, thank you.

THE COURT: Thank you, counsel.

We will have the rebuttal now.

MR. MASTERSON: Thank you, sir. It seems to me that the position advanced by the government here makes absolutely no sense at all if the Court considers any canon of statutory construction, any at all. What they are saying to this Court is read this statute as if it says if an indictment is dismissed for any cause, the government has six months to reindict. It seems to me a complete answer to that is if that was what Congress intended, that's what this statute would have read. It does not read that way.

It reads as I have expressed to the Court before in basically two different clauses, one having to do with defects or irregularities with respect to the Grand Jury, and the other with respect to defects or insufficiencies of the indictment, the paper itself. It does not say defects or irregularities with respect to the Grand Jury proceedings. It does not say simply or defects for any cause.

JUDGE SEITZ: Did you want to comment on the Attorney General's letter?

MR. MASTERSON: Yes, because the Attorney General's letter, if you read it, it says —

JUDGE SEITZ: We will read it.

MR. MASTERSON: I'm sure you will. It was not quoted fully. If you read it, it says that the previous indictment is dismissed because it is defective or insufficient, and that language tracks the language in the statute and they are both words of art. Our position here is this original indictment was neither defective nor insufficient. Indeed, we pleaded guilty to it. Therefore, to argue that it was dismissed because it was defective or insufficient doesn't make any sense.

JUDGE SEITZ: You consider any factor of prejudice irrelevant in this discussion, is that right?

MR. MASTERSON: Technically, yes. Our technical position is look at the language of the statute. Look

at what happened in this case. You cannot conclude that the facts of this case fit within either of the clauses, the operative clauses of the language of the statute. That is our basic position.

JUDGE SEITZ: Thank you, Mr. Masterson. The Court will take the matter under advisement.